Supreme Court of the United States

OCTOBER TERM, 1944

No. 849

THOMAS MARTINO
Petitoner

vs.

MICHIGAN WINDOW CLEANING COMPANY
Respondent

OPPOSING BRIEF OF RESPONDENT IN THE MATTER OF THE PETITION FOR WRIT OF CERTIORARI

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THE INLAND PRESS, DETROIT, MICHIGAN

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Questions Involved

The questions presented by the Petitioner are somewhat at variance with the questions presented in the appeal to the Circuit Court of Appeals. Petitioner attempts to submerge a vital fact concerning the nature of the business of the Respondent and its employees. The questions involved which were answered affirmatively in the Lower Court and in the Circuit Court of Appeals, are as follows:

1. Is a concern, exclusively engaged in washing windows of buildings, which it does not own or control, all of which buildings are located within the State of Michigan, a "service establishment" within the meaning of Sec. 13(a) of the Fair Labor Standards Act of 1938?

2. Since the concern is a "service establishment" within the meaning of the law, does the exemption operate if the concern is engaged exclusively in servicing buildings located only in the State of Michigan?

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Counter-Statement of Facts

Petitioner's counsel's statement that "all the material facts are stipulated" is somewhat misleading, particularly as he follows said statement with the additional words, "on the basis of the following undisputed facts," and then proceeds to make allegations which were not stipulated and attempts to enlarge upon the facts which were stipulated. We are therefore constrained to call attention to the inaccuracies in Petitioner's Statement.

Respondent owns and operates a window cleaning business. It is not a "large" business. It employs about twenty men. The window cleaners in the employ of the Respondent wash windows in all types of buildings, but certainly that can not be called "keeping the factory clean to that event."

There is no stipulation covering the statement of counsel

for Petitioner concerning the possible or likely effect of window cleaning. Neither was it stipulated what the petitioner would have proved if the District Court had not dismissed the complaint.

There is no stipulation "which showed that more than a substantial part of the work done by petitioners was on buildings in which goods were produced for interstate commerce." The stipulation of facts (R. 10) states:

> "That the parties plaintiff were employed as window washers and cleaners by defendant corporation, and were assigned by the defendant to the cleaning of windows on various buildings whose occupants were under contract with the defendant corporation for the performance of such window washing."
>
> "That among such occupants were companies definitely engaged in the production of goods in interstate commerce, such as various units of the General Motors Corporation."

The quotation from the opinion of the Honorable Frank A. Picard, District Judge, on page 4 of Petitioner's Petition filed in this Court, removed from the content of the opinion and coupled with the misleading statement of the stipulated facts, presents an erroneous picture of the questions involved.

The quotation above mentioned was a part of the Court's statement in reference to the claim of Respondent on the question of the nature of the contract entered into between the union (of which the plaintiffs were members), and the Respondent corporation. This question was not passed upon by the Circuit Court of Appeals and is not raised by the petitioner in his petition for a Writ of Certiorari, and therefore can have no place in the presentation of his petition.

The additional stipulated facts (R. 19) did not alter the situation. There was an ample showing that the establishment of the Respondent was a service establishment. The claim of the plaintiffs was based upon a misinterpretation of the *Kirschbaum vs. Walling* case, 316 U. S. 517. The plaintiffs (petitioners in the case at bar) based their claim upon the nature of the business of the customers of their employer and even stretched this concept to cover the work of the employees of the customers of the Respondent, in order to attempt a tie-up with production of goods for commerce.

Petitioner proceeds at great length to state what he would have proved if he had been given an opportunity so to do, apparently overlooking the "Issues of Fact" which were stipulated by the respective counsel for the parties (R. 12, 13). It was the plaintiff (Petitioner herein) who forced the issue by urging and securing a stipulation of facts and then filing two separate motions for a judgment upon the pleadings and the stipulated facts. The court passed upon the issues presented by the plaintiffs.

The respondent is engaged in the washing and cleaning of windows on buildings located wholly within the State of Michigan. It contracts to perform the services of washing and cleaning windows on any and all buildings in the State of Michigan and employs workmen to do the work of the washing and cleaning of windows (R. 19). It neither owns nor leases the buildings upon which the work is performed, and has nothing whatever to do with, and no control over, the activity going on in the building and is not at all concerned with the activity of the persons for whom it washes and cleans windows.

The petitioner and other employees of the Respondent, are members of Local 139 Detroit Window Cleaners Union, American Federation of Labor, and were such members for

a number of years previous to 1939 and up to and including the date of the litigation now pending. The Union, acting for and in behalf of the Petitioner and other employees of Respondent, had made an agreement with the Respondent and had renewed it for a number of years preceding and including 1939, up to and including the time of commencement of the present suit (R. 11).

The payment of compensation by Respondent to its employees, including the petitioner, was in accordance with the agreement providing for upwards of $1.15 per hour and time and one-half for over 44 hours, between the Petitioner and the union on one hand, and the Respondent on the other. The agreement referred to and those agreements that preceded it, were freely, voluntarily and in good faith entered into between the union acting on behalf of its members and authorized so to do, and the Respondent. All the agreements executed between the union on behalf of its members and the Respondent from the time their relations first began were fully observed by the Respondent. The agreement between the parties in existence at the time suit was started, and its predecessors, provided for a closed shop (R. 11).

Petitioner is Not Entitled to Writ of Certiorari

(1) The decisions of the District Court and of the Circuit Court of Appeals in the present case are in conformity with the decision in the case of *Kirschbaum vs. Walling*, 316 U. S. 517, and other cases.

(2) The decisions of the lower courts in the present case conform to similar decisions in other circuits.

(3) The decisions of the lower courts are not erroneous, but follow the opinions of this court and other Circuit Courts of Appeal.

(4) There was no error committed in the lower court.

ARGUMENT AND LAW

The brief of Petitioner indulges in legal sophistry, and conclusions based thereon, which if sustained, would reduce the obvious intent of the law to an absurdity. Petitioner in this way seeks to read into the law a provision never intended, namely, that the criterion for coverage is not what business the employer is engaged in but the business that the customer of the employer is engaged in and the type of work employees of the customer are engaged in. Nowhere in the law is there any excuse or basis for such assumption.

The decisions of the District Court and of the Circuit Court of Appeals in the present case are in conformity with the decision in the case of Kirschbaum vs. Walling, 316 U. S. 517, and other cases.

The criterion of coverage is not what Petitioner would have it appear. All of the cases cited in Petitioner's brief very clearly indicate that each case must be decided upon its own facts and circumstances and that there can be no set rule governing all situations.

The case of *Kirschbaum vs. Walling*, 316 U. S. 517, 86 L. Ed. 1638, chiefly relied upon by the Petitioner to sustain his alleged cause of action very definitely puts the Petitioner out of court. The attorneys for the Government in that case stated (page 1642):

> "The statute does not attempt to enumerate what processes or occupations are 'necessary to the production.' That question is rather left to be determined upon the facts of individual cases as they arise" (citing cases).

Mr. Justice Frankfurter, on pages 1647 and 1648, said:

> "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations. Our problem is, of course, one of drawing lines. But it is not at all a problem in mensuration. There are no fixed points, though lines are to be drawn. The real question is how the lines are to be drawn—what are the relevant considerations in placing the line here rather than there. To that end we have tried to state with candor the larger considerations of national policy, legislative history, and administrative practicalities that underlie the variations in the terms of congressional commercial regulatory measures, and which therefore should govern their judicial construction."

A very important distinction explicitly stated in the *Kirschbaum v. Walling* case has apparently been completely overlooked by counsel for Petitioner. Mr. Justice Frankfurter, on page 1649, said:

> "The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a) (2), 29 USCA, Sec. 213(a) (2). *Selling space in a loft building is not the equivalent of selling services to consumers*, and, in any event, the 'greater part' of the 'servicing' done by the petitioners here is not in intrastate commerce" (Italics ours).

This distinction by Mr. Justice Frankfurter clearly shows that exemption under Sec. 13(a) (2) does have a different criterion for coverage.

In other words, while the courts have decided that the general test of coverage is the work of the individual employee, *the test of the exemption under* 13(a) (2) *is the business of the employer.* (Italics ours.)

In the case at bar Respondent is a Michigan corporation, engaged in the business of washing and cleaning windows for consumers. It is very definitely a service establishment. It sells nothing but its services and the services of its employees in washing and cleaning windows. It produces no goods; it sells no goods and is not engaged, and none of its employees, is engaged in "producing, manufacturing, mining, handling, transporting or in any other manner working on such goods or in any process or occupation necessary to the production thereof."

All the legal sophistry so ingeniously employed by Petitioner can not change the nature of the work and the business engaged in by the Respondent.

In the case of *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1539, the Circuit Court of Appeals for the Fifth Circuit held that a cook employed to prepare and serve meals to maintenance of way employees of the Texas and New Orleans Railway Company was not engaged in commerce within the meaning of the Fair Labor Standards Act and therefore not entitled to recover for overtime. The defendants were a partnership with a contract to furnish meals to maintenance of way employees of the railroad, an interstate carrier. The meals were served in a cook and dining car attached to a particular gang of workmen and running on the railroad's tracks. Employees paid the contractor for their meals. The petitioner worked as a cook in various points in Texas along the line of road during the period in question. The Supreme Court upheld the Circuit Court of Appeals that the employee was not engaged in commerce under the Fair Labor Standards Act.

The decision in the case at bar follows the decision of the Sixth Circuit Court in the case of *Lonas v. National Linen Service Co.*, 136 Fed. 2nd 433, in which case this Court denied certiorari (320 U. S. 785).

The facts in the case at bar are very similar to the facts in the *Lonas* case. Prior to the decision in the *Lonas* case, the District Judge in his opinion filed February 3, 1943 (R. 17), said:

> "It is well to note, however, that in the Court of Appeals decision of this same case, 124 Fed. (2nd) 572-3 the court in suggesting illustrations of what Congress meant by 'service establishments' specifically mentioned
>
> > 'barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.'
>
> "Evidently, therefore, that court with a broad and liberal interpretation of the Fair Labor Act in mind and desirous of accomplishing the objective of Congress on as broad a basis as possible, included 'laundries' among those exemptions. Of course the court evidently meant 'clothes laundries' but is there a great deal of difference between the ultimate functions of a laundry for clothes and a laundry for windows? What the Court of Appeals said, however, in quoting the foregoing illustrations from another decision is only dictum, but we believe there is a distinction between the facts in the Kirschbaum case and the facts here. In the Kirschbaum case the employees were all part of and went with the rental of the buildings. Kirschbaum wasn't furnishing 'service' as such. But here the defendant was furnishing window washing and this in our opinion makes it obviously a service.
>
> "Evidently Congress anticipated the possibility of purely service establishments rendering service to those engaged in interstate commerce and those not so engaged. Otherwise why did it so word the exemption as to exclude those service establishments where the greater part of their service was done in intrastate commerce?"

Following the decision in the *Lonas* case, supra, the District Court Judge filed an opinion on July 13, 1943, and said:

> "The question here then is:
>
> "'Is a service establishment engaged in interstate commerce because its employees (who do not go out of the state to work) do render service to customers who are admittedly engaged in interstate commerce, which service indirectly aids those customers "in the production of" their "goods for interstate commerce," and which service amounts to more than 50 per cent of the service establishment's business?'
>
> "If the position contended for by plaintiff is a correct statement of the law, then a comparatively few people, service establishments or otherwise, would not be included as subject to the Fair Labor Standards Act. If rendering the service of washing windows in a building for occupants who are engaged in interstate commerce automatically makes the window washers engaged in interstate commerce it would be difficult under our complex economical and commercial life to conceive a situation where any workman would not come under the Act. From this conclusion it would be but another step to hold that a window washing company that served a hotel would have to find out from week to week what the occupants of the several hotel rooms did for a living, whom they were representing, if their firms were engaged in interstate commerce. Soon the law's applicability would be '*reductio ad absurdum.*'
>
> "And this was not the decision in *Kirschbaum v. Walling*, 316 U. S. Reports 517. There the window washers, janitors and elevator operators were part of the establishment that was rented to the company engaged in interstate commerce."

The cases cited by Petitioner are not applicable because they are based upon Petitioner's misapplication of the

facts and his distortion of the decisions, in an attempt to make them conform with the facts in the case at bar.

In the case of *White v. Jacobs Pharmacy*, 47 Fed. Sup. 298 (District Court N. D. Georgia, Atlanta Division) the Court on page 299, said:

> "It may be stated at the outset that while in applying the provisions of Sections 6 and 7 of the Fair Labor Standards Act the test of coverage related to the nature of the employment of the particular employee (*Fleming v. A. B. Kirschbaum*, 3 Cir., 124 F. 2nd 567), as concerns exemptions 'the criterion used in Section 13(a) (2), on the other hand is based upon the nature of the business conducted by the employer.' *Interpretative Bulletin No. 6, Wage & Hour Division, Fleming v. A. B. Kirschbaum, supra*, 124 F. 2d at page 570, note 2. This distinction clearly appears from the words of the statute. Thus in dealing with the present case the true question is the nature of the business conducted by the defendant. * * *
>
> "It thus appears from the interpretation of the Administrator, as well as from the contention of the plaintiff in this case, that the sole fact relied upon to remove the defendant's operation from the effect of the exemption is the physical location of its office and warehouse, as well as the fact that its branches are located in eighteen separate buildings instead of one building. The operations of the plaintiff meet every test laid down by the Wage & Hour Division except that of physical location. Nothing is found within the terms of the statute which justifies a determination of the question of whether an enterprise is or is not a retail establishment predicated solely upon the physical location of its component parts. It appears rather that it was the clear intention of Congress to remove the effect of the operation of the statute from those firms engaged in retail selling either intrastate, or when even the 'greater part of whose selling * * * is in intrastate commerce.' It is the nature of the

> business rather than the location or locations in which it is conducted which determines coverage or exemption under the statute."

In the case of *Walling v. Rolland Electric Co.*, 54 Fed. Sup. 733, District D, Maryland, the Court approvingly quoted the case of *Lonas v. National Linen Service Co.*, and the decision of the Circuit Court of Appeals in the case at bar.

In the case of *Twyman et al v. Milk Bottlers Federation*, 47 N. Y. Sup. 2nd Series, 206, the Court held that the business of the defendant was that of a service establishment and that as such it was within the exception provided for in the second clause of subdivision (a) Section 213 of the Fair Labor Standards Act.

In the case at bar the various tests applied to determine whether a concern is a service establishment lead to the inevitable conclusion that the Respondent meets these tests and is a service establishment.

The Respondent performs services directly for the consumer, namely, it washes windows for the consumer who occupies the building. The employees are employees of the Respondent under the direct supervision and control of Respondent. The Respondent hires its own employees and then details the work to be done by the employees. The Respondent is not in any way connected with, nor are its employees connected with, either the buildings in which they wash windows or any of the proceedings or activities maintained in the buildings.

In the case of *Gavril v. Kraft Cheese Co.*, 42 F. Supp. 702, District Judge Campbell, on page 704, said:

> "In order to clarify activities of the employee, however, it is necessary to consider the activities of the employer by whom he is engaged."

As previously stated in this Reply Brief, Mr. Justice Frankfurter, in the *Kirschbaum* case, supra, distinguished the facts in that case: The employees in the *Kirschbaum* case, supra, were actually engaged in the production of goods for commerce. The companies for whom they worked rented the buildings to manufacturers engaged in interstate commerce. The building employees provided the elevator service which carried the goods in and out of the building, operated the boilers which provided the heat for the manufacturing enterprises. The owners of the buildings were not engaged in servicing to customers. They were renting space to manufacturing establishments. The Government, in its brief, as quoted in the Supreme Court decisions, clearly posited its claim on the employer being engaged in interstate commerce in that its employees actively participated in the handling of goods in interstate commerce. The Government claimed (page 1643):

> "The activities of maintenance employees such as those here involved constitute processes or occupations necessary to production within the meaning of Sec. 3(j), 29 USCA, Sec. 203(j)" (citing cases).

And again on page 1643:

> "Petitioner's freight elevator operators are also 'engaged in commerce' within the meaning of Sec. 6 and 7, 29 USCA, Sections 206, 207" (citing cases).

And on page 1644:

> "Performance of the carrier's contract for interstate transportation is completed only when delivery is accepted by the consignee, the manufacturer, at his own premises on a certain floor of petitioner's building" (citing cases).

In the case of *Lonas v. National Linen Corp.*, 136 Fed. 2nd, 433, cert. denied 320 U. S. 785, Judge Simons said:

> "We find no support for this interpretation in the language of the exemption section. Two enterprises are therein exempted, one a retail establishment and the other a service establishment, the exemption of each subject to the condition that in the case of the retail establishment the greater part of its selling must be in intra-state commerce, and in the case of a service establishment, the greater part of its servicing must be in intra-state commerce. Had the Congress intended to limit the exemption of service establishments to those who perform services for private enterprises, it would have had little difficulty in clearly expressing such purpose."

The scope of applicability of exemptions was outlined in the Interpretative Bulletin No. 6, issued December 7, 1938, by the Administrator of the Wage and Hour Law, which is contained in the Wage and Hour Reference Manual, Volume 1, page 76, as follows:

> "It should be noted that the test prescribed in sections 6 and 7 is related to the nature of employment of the particular *employee. The criterion used in Section* 13(a) (2), *on the other hand, is based upon the nature of the business conducted by the employer.* Thus, under sections 6 or 7 *some* employees of a given employer may be covered and others may not be covered. If, however, the exemption provided by Section 13(a) (2) is applicable because the greater part of the selling or servicing by the retail or service establishment is in intra-state commerce *all* employees of the establishment are exempted from Section 6 and 7." (Italics ours). (The exemption of Section 13(a) (2) applies to service companies, as in the case at bar.)

Nowhere in the law or in the adjudicated cases is there any basis for the position claimed for the Petitioner, namely, that in the statutory exemption the criterion is the nature of the work engaged in by the customers of an employer or the employees of a customer of an employer. The nature and extent of the employer's or establishment's business is the determining factor.

Petitioner's brief, in attempting to distinguish the *Lonas* case, supra, attempts to narrowly define a single phrase of the statute, as well as leaving out and ignoring the very significant phrase, "the greater part of whose selling or servicing is in intra-state commerce." Nowhere in any adjudicated cases is there support for the interpretation contended for by Petitioner, to circumscribe the word "establishment" as meaning a particular building in which the employer may have his office. Obviously, a service establishment is a service company and the word "establishment" is not intended to mean a building. Petitioner's construction tortures the English language beyond recognition.

CONCLUSION

The interpretation sought by the Petitioner would read into the law language never intended by Congress. If it had been the intent of Congress to include all activities affecting commerce, then certainly the statute would so have provided. The statute, however, explicitly states the Congressional finding and declaration of policy, among which are the following words:

> "The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum

standard of living necessary for health, efficiency and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) *leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce;* and (5) interferes with the orderly and fair marketing of goods in commerce." (Italics ours.)

Under "Definitions" in Section 203 of the Act, we find:

"'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual, physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"'*Produced*' *means produced, manufactured, mined, handled, or in any other manner worked on* in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (Italics ours.)

The Act then goes on to provide for the appointment of industry committees, for each industry engaged in commerce or in the production of goods for commerce. (Section 205 of the Act.)

Section 206 of the Act then provides for minimum wages starting at 25c an hour, up to 30c an hour. Section 207

provides for the maximum hours of employees covered by the Act. Section 208 sets forth the main objective, and says:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, *the objective of a universal minimum wage of* 40 *cents an hour in each industry engaged in commerce* or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein." (Italics ours.)

Section 213 provides the exemptions. It is the claim of the Respondent that its business comes within the exemption.

A reading of the entire Act, the purposes for which it was enacted, the objectives sought to be obtained, clearly shows that the lower courts did not err in arriving at their decisions in the case at bar.

Petitioner attempts to create a situation which is far removed from the purposes and objectives of the Fair Labor Standards Act. As stated by this Court in the case of *United States v. American Trucking Associations,* 310 U. S. 534; 84 L. Ed. 1345, page 1350:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not con-

tribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet needs of a major occupation."

It is the contention of Respondent that the position of the Petitioner is untenable. There is no question but that the Respondent is a service establishment. There can be no question but that the Respondent comes squarely within the exemptions of the Statute. We therefore respectfully submit that the petition of the Petitioner should be denied, with costs to this Respondent.

Respectfully submitted,

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